

BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

GEORGE OSBORNE,	)	
	)	
Appellant,	)	SHB No. 88-37
	)	
v.	)	
	)	
MASON COUNTY,	)	FINAL FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.	)	
	)	

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This decision involves George Osborne's appeal of Mason County's issuance to him of a shoreline substantial development permit with conditions for a site by Spencer Lake.

The hearing on the merits was held on September 25, 1989 in Shelton and on September 26, 1989 in Lacey, Washington. Present for the Board were Members: Judith A. Bendor, Presiding; Wick Dufford; Nancy Burnett; Paul Cyr; and Richard Gidley. Appellant Osborne was represented by Attorney Andrew W. Mackie (Olympia). Respondent Mason County was represented by Deputy Prosecuting Attorney Michael Clift.

1 Court reporters affiliated with Gene Barker & Associates recorded the  
2 proceedings.

3 Testimony was heard and exhibits admitted and examined. Counsel  
4 filed and made argument. The Board having reviewed the record and  
5 deliberated, makes the following:

6 FINDINGS OF FACT

7 I

8 On July 26, 1988, Mason County issued a shoreline substantial  
9 development permit to George R. Osborne retroactively allowing fill on  
10 his shoreline property, subject to four conditions:

11 1. All fill must be removed beyond OHWM (Ordinary High  
12 Water Mark) as determined by Washington State Department  
13 of Ecology, Mason County and Washington State Department  
of Wildlife.

14 2. Vegetation of fill areas or other measures are  
required to prevent erosion into the lake.

15 3. Submittal of fill removal and restoration plan to  
16 Mason County for approval prior to commencement of fill  
removal.

17 4. Removal of all fill beyond OHWM to be completed within  
18 30 days of shoreline permit issuance provided this is  
19 acceptable to Washington State Department of Wildlife.  
20 Timing of fill removal to be coordinated with Washington  
State Department of Wildlife.

21 The key factual issue under dispute is: where is the ordinary high  
22 water mark on Lot G ("the lot") of the property? Only the fill on  
23 that lot is at issue in this appeal.

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26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

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II

Spencer Lake is a 230 acre lake in Mason County. It is reknowned for its trout fishing.

In December 1986, George R. Osborne and his wife purchased 4.4 acres of property which has a shoreline along the Lake. In March 1987 the County approved an eight lot short plat for the property. The Jeffcos are the property owners to the immediate northeast, along the 240 foot property line. Mr. Osborne plans to build a house on Lot G for his family's use. Lot G is the most northeasterly lot on the property. (Hereafter that part of lot G, near the shoreline which is the area where the issue of the OHWM was litigated, will be referred to as "the site".)

In the spring of 1987, appellant had all the vegetation removed from an area along the shoreline of lot G. The vegetation removed included willows, grasses, salal and several trees. Fill was hauled in over a 2 month period at a cost of \$3,800. Mr. Osborne had 2,800 cubic yards placed on his property, the majority of it placed on the site in lot G. The site was graded with the fill to depths of 1 to 2 feet. All this work was done without a shoreline permit.

The County learned about the work and after a site visit, had a "stop work order" posted on site in April 1987. This was subsequently lifted, after which Mr. Osborne took logs floating in the lake, pulled them across the water, and placed them against the fill to form a partial bulkhead.

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IV

On February 26, 1988, Mr. Osborne filed an application with Mason County for a retroactive shoreline substantial development permit for the work. In July 1988, the County granted the permit with four conditions, Mr. Osborne timely appealed to this Board. The appeal became our SHB No. 88-37.

V

Determining the OHWM that existed on this site prior to filing on this site poses some difficulties, as Mr. Osborne's own actions have significantly altered the site. The County and the Department of Ecology conducted two post-fill site visits to determine that line. As a result they posted stakes reflecting their determination of the OHWM. Exhibit R-21 and photographs. It is this line that Mr. Osborne contends is in error. Appellant bears the burden of proving what the correct OHWM is.

VI

The relevant definition of Ordinary High Water Mark is found in the Mason County Master Program ("MCSMP") at 7.08.150:

Ordinary High Water Mark. "Ordinary High Water Mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks, and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971 or as it may naturally change thereafter: Provided, that in any area where the ordinary high

1 water mark cannot be found [ . . . ] the ordinary high  
2 water mark adjoining fresh water shall be the line of  
3 mean high water.

4 Insofar as relevant here, the Shoreline Management Act ("SMA") at RCW  
5 90.58.030(2)(b) is the same.<sup>1/</sup>

6 VII

7 Soil core samples were done in 1989. Based on these samples,  
8 appellant's expert drew a line (Exh. A-26 as initialed RLV, see  
9 attached) showing what he concluded was the OHWM. We concur that this  
10 is the OHWM. The cores were examined for the type of soil and whether  
11 there were remnants of vegetation. There is further support for his  
12 conclusion that the area north of the line was not within the OHWM.  
13 An old cabin had been on the site and was surrounded on three sides by  
14 salal, which is vegetation that does not survive in areas periodically  
15 covered by water. From all the evidence, we are convinced that the  
16 ordinary high water did not extend north of this line.

17 Several photographs show water in the area south of the line  
18 drawn by appellant's expert or directly adjacent to the fill there.  
19 There had been willows in this area, a typical wetland vegetation.  
20 Mr. Osborn's own photograph taken in April 1988 show him pushing a log  
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22  
23 <sup>1/</sup> Mason County's definition is modelled on the original version in  
24 the SMA. The SMA definition has been changed to include the following  
25 phrase: "or as it may naturally change thereafter or as it may  
change thereafter in accordance with permits issued by a local  
government or the department: [ . . . ]"

1 across water and directly placing it against the fill. The previous  
2 topography of the land prior to filling, evidenced a gentle slope  
3 towards the lake rather than an abrupt ledge. This topography further  
4 supports the factual determination that the site south of the expert's  
5 line in A-26 was within OHWM prior to the filling.

#### 6 VIII

7 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
8 adopted as such.

9 From these Findings of Fact, the Board makes these

#### 10 CONCLUSIONS OF LAW

##### 11 I

12 The Shorelines Hearings Board has jurisdiction over these parties  
13 and these issues. RCW 90.58.180.

##### 14 II

15 We conclude that the Ordinary High Water Mark pursuant to the  
16 Mason County Shoreline Management Program at 7.08.150 and the SMA at  
17 90.58.030(2)(b) is that shown on Exhibit A-26.

18 We are not persuaded by appellant's argument that the OHWM  
19 historically, prior to June 1, 1971, may have been in a different  
20 location. The issue is what was the OHWM after the enactment of the  
21 SMA and prior to the placement of fill.

22 Appellant seeks to prove that the OHWM should be determined by  
23 subtracting out the water level caused by beaver damming action. The  
24 legal definition of OHWM in the MCSMP and the SMA does not delve into  
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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

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1 causality, but is "grounded" upon ascertaining where the presence of  
2 water is so common and usual as to distinctively mark the soil.  
3 Therefore, beaver activities that may have affected the OHWM do not  
4 create an exception to the definition. Beaver are a part of the  
5 environment and their activities are encompassed by the phrase in SMP  
6 7.08.150 "or as may naturally change thereafter."

7 III

8 Any Finding of Fact which is deemed to be a Conclusion of Law is  
9 hereby adopted as such.

10 From these Conclusions of Law, the Board enters this  
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ORDER

The substantial development permit issued by Mason County to George Osborne is AFFIRMED except that Condition No. 1 is MODIFIED to read as follows:

1. All fill must be removed beyond the OHWM (Ordinary High Water Mark) on lot G as shown on Exhibit A-26. AS MODIFIED the permit is REMANDED to the County for re-issuance in conformance with this Order.

DONE this 19th day of December, 1989.

SHORELINES HEARINGS BOARD

Judith A. Bendor  
JUDITH A. BENDOR, Presiding

Wick Dufford  
WICK DUFFORD, Member

Nancy Burnett  
NANCY BURNETT, Member

Paul Cyr  
PAUL CYR, Member

Richard Gidley  
RICHARD GIDLEY, Member

Attachment: Exhibit A-26

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

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